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No. 06-427

In The Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* BRENTWOOD ACADEMY PARENTS, HARRY ALLAN, MICHAEL BLALOCK, SCOTT BROWN, LOUIS BULLARD, WALLY KNOX, MILBREY GANICK, JOHN SLAUGHTER, AND MICHAEL VAUGHN IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

Amici curiae Harry Allan, Milbrey Ganick, and John Slaughter are parents of Brentwood Academy graduates and of sons who received the letter that initiated the events that led to this litigation. *Amici* Mike Blalock, Scott Brown, Louis Bullard, Wally Knox, and Michael Vaughn are parents of children who currently attend Brentwood Academy. All of the *amici* share interests in promoting the exchange of information between schools and the parents of students and of potential students. Full information is essential in selecting schools and in overseeing children's education. Restrictive rules concerning the initiation of contact with high school students and rising high school students interfere with schools' ability to provide full information to a wide spectrum of parents. *Amici* also share an interest in supporting and promoting the development of Brentwood Academy, which is adversely and substantially affected by unnecessarily harsh restrictions on recruiting students. The school is especially disadvantaged by Tennessee's existing recruitment policies in attracting to Brentwood qualified students from lower socio-economic status, a fact which hampers its ability to build and maintain a diverse student body.

SUMMARY OF ARGUMENT

The First Amendment does more than protect the rights of speakers and the press. It also confers on listeners and readers a right to receive information; the Amendment bars unwarranted governmental interference with the dissemination of information that drives markets.

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[1] This *amici curiae* brief is submitted with the consent of all parties in this action. Letters to that effect have been filed with the Court. No counsel for a party authored this brief in whole or in part.

"The general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761 (1993). This principle has special force in the education market, where the decisions are so critical and so complex. That market today offers parents a wide range of choices in picking a school for their child. The parents need information from schools in making their selection and in learning about educational opportunities after the selection is made. Schools, too, need to reach out to parents. The outreach is especially critical for the schools to identify and attract low income students, who are unlikely to inquire or learn about the range of school options. Private schools depend upon recruitment to attain diverse student bodies. TSSAA's[2] recruitment rule seriously impairs the flow of useful information from schools to parents, students, and potential students.

The Sixth Circuit determined that intermediate scrutiny should apply. Assuming that is the standard, the TSSAA's action in this case cannot satisfy it. The standard holds that the Association must demonstrate that its discipline of Brentwood Academy was narrowly tailored to promote a significant interest and left open adequate alternative channels. Three interests were advanced by TSSAA to support its action: protecting students from exploitation and harassment, preventing athletics from dominating academics, and maintaining competitive equity. Even if those interests are significant, the disciplining of respondent's speech in this case did nothing to promote them. That speech included a letter and a follow-up phone call. The letter informed students who had

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[2] This brief refers to petitioner Tennessee Secondary School Athletic Association as "TSSAA," "the Association," or petitioner.

already committed to attend Brentwood Academy in the fall that spring football practice was about to begin and that they were invited to attend. Their participation in the practices was permitted by TSSAA rules. The phone call that ensued was to reassure parents that their sons' participation in the practices was voluntary. No reasonable person can conclude that two contacts to contracted families conveying information about a legitimate school activity, which the students would not otherwise have known about, could implicate any of the asserted state interests.

The Association fails in its attempts to characterize this case as one akin to those involving government grants or public employees. This case does not concern conditions attached to government funds. The TSSAA here has purchased nothing from the school, has not bestowed any grant on it, and has not underwritten any school activity. In the same vein, the TSSAA does not direct and pay the schools, as it does with its employees, to conduct its business or execute its programs. Rather, the TSSAA creates and enforces regulations that govern the state's high school athletics, in general, and communications between schools and potential students, in particular. The Association acted in this case as an enforcer of its recruitment rule. The validity of its action is accordingly governed by decisions such as those in which professional boards have enforced rules of conduct against exercises in speech. *E.g.*, *Edenfield*, *supra*; *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988). Under the rubric of those decisions, it is clear that the state may not punish the unobtrusive communication of accurate information about a lawful activity.

The district court found in this case that the TSSAA disciplined Brentwood Academy because of the content of

its communications. Thus, in order to sustain that discipline, TSSAA must show that it was necessary to achieve a compelling state interest or that the speech was categorically punishable. *E.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971). The speech in question was clearly within protected speech, and for the same reasons the TSSAA could not satisfy intermediate scrutiny, it fails to meet strict scrutiny.

For the reasons stated in the brief of *amicus curiae* Association of Christian Schools International, the recruitment rule is unconstitutional on its face. The rule is particularly officious in its restrictions on schools' ability to initiate personalized contact with potential students. Those restraints especially burden the schools' ability to attract qualified students from low income families. That, in turn, means that most low income families will not receive the information they need to make informed education decisions.

ARGUMENT

I. TSSAA'S RECRUITMENT RULE UNREASONABLY IMPAIRS THE FLOW OF VALUABLE INFORMATION TO PARENTS AND STUDENTS.

TSSAA's interpretation of its recruitment rule, as demonstrated by the particular facts in this case, does more than restrict the freedom of speech of Brentwood Academy ("Brentwood") and its agents. The Association also seriously deprives potential students (including those who have signed contracts to enroll and paid their deposit) and their parents of information that they need to make educational choices and to make the most of

their educational experience. As such, the rule constricts valuable First Amendment rights of that audience.

"Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). This Court accordingly ruled that the Virginia Pharmacy Board could not constitutionally keep from prescription drug consumers information they needed to make informed decisions in buying drugs. Virginia's law prohibiting pharmacists from advertising "any amount, price, fee, premium, discount, rebate or credit terms"[3] for any prescription drugs violated consumers' First Amendment rights. "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Id.* at 757. The Court reasoned:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

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[3] 425 U.S. at 750, *quoting* Va. Code Ann. § 54-524.35(3).

Id. at 765 (internal citations omitted).[4] To be sure, Brentwood's speech in this case was not commercial speech.[5] The principle, however, of the need for a free flow of information for markets to work applies with equal (or greater) force in the context of making educational choices. As Brentwood's expert Dr. James Guthrie said in speaking about that very context, "Markets can't operate, or at least they can't operate efficiently, unless those who come to the market with products and services and those who come to the markets seeking products and services are well-informed." Trial Transcript ("Tr. Tr.") at 837.

This Court has consistently sustained the right to receive information and has done so in a variety of contexts. *Lamont v. Postmaster General*, 381 U.S. 301 (1965), for example, invalidated a postal regulation that burdened

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[4] More recently, the Court in *Edenfield v. Fane*, 507 U.S. 761 (1993), found unconstitutional Florida's ban on certified public accountants' initiating contact with potential clients and soliciting their business. The Court explained:

> In denying CPA's and their clients these advantages, Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Id. at 766 (citations omitted).

[5] That is, conveying information about spring football practice in no way "proposed a commercial transaction," identified a commercial product or service, or promoted Brentwood's economic interests, which are the critical factors in this Court's definition of commercial speech. *E.g., City of Cincinnati v. Discovery Network Channel, Inc.*, 507 U.S. 410, 422-23 (1993); *Bolger v. Youngs Drug Products*, 463 U.S. 60, 66-67 (1983).

citizens' rights to receive certain political publications from foreign sources. Similarly, in *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), the Court held that, although an unadmitted nonresident alien could claim no right to enter the country to conduct a lecture tour, professors who wanted to bring him here to hear and debate him could assert a First Amendment right to challenge his exclusion. Their claim was "the right to receive information and ideas." *Id.* at 762, *quoting Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Even if prisoners lose a good portion of their expressive freedoms when they become incarcerated, prison censorship of their mail nevertheless implicates the First Amendment because their addressees have a right to receive unfiltered correspondence from the prisoners. *Procunier v. Martinez*, 416 U.S. 396 (1974); *see also, e.g.*, *Marsh v. Alabama*, 326 U.S. 501, 505 (1946); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Recognition of this "right . . . to acquire useful knowledge" has a venerable place in constitutional law. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The record in this case establishes the importance of the free flow of information for schools, parents, and students in making educational choices. Choices abound in education today more than ever; the proliferation of private schools, charter schools, magnet schools, vocational schools, and liberal public school transfer policies now provide families with an array of options. *McFarland v. Jefferson County Bd. of Educ.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005) (describing wide range of parental choices in a public school system), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, ___ U.S. ___, 74 U.S.L.W. 3676 (June 5, 2006); *Brentwood*

Academy v. Tennessee Secondary Sch. Athletic Assn., 304 F. Supp. 2d 981, 989, 991 (M.D. Tenn. 2003).[6] The No Child Left Behind Act mandates that low performing public schools provide, at the state's expense, alternative schooling for any requesting students. 20 U.S.C. § 6316(b)(1). School choice promotes competition among schools to keep and retain good students, and that, in turn, enhances the quality of schools. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 644-48 (2002). Diverse choices enable parents to find a school that suits their values and their child's needs.[7] As a consequence, making choices becomes increasingly difficult. "Education is a complicated business," Professor Ellen Goldring explained, "and [choosing a school is] a very important decision. And obviously . . . families [can't][8] make good decisions about the best fit, what their child needs and where their child can be most successful[,] if they don't have access to good information." JA-304.

Critical to this educational decision-making process is the ability of a school to reach out to families to inform them of its existence, emphases, qualities, and philosophy. *E.g.*, JA at 359 (Testimony of James Guthrie). Attracting students is essential not only for a school's economic well-being, in terms of having a sufficient number of students to meet budgetary needs, but also to ensure the diversity

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[6] Plaintiff's expert and Peabody Professor of Education Ellen Goldring also described the recent developments emphasizing and expanding parental choice in education. Tr. Tr. 323-29.

[7] Several parents testified in this case that they selected Brentwood Academy for their child because of the school's tripod approach to education – developing academic, athletic, and spiritual qualities – and because it best suited their child. *E.g.*, Tr. Tr. 471 (Testimony of John Slaughter); Tr. Tr. 761-62 (Testimony of Harry Allan).

[8] The record states that the witness said that "families can make good decisions" without good information, but it is apparent from the context that the "can" was an error and that it should have read "can't."

that is so vital to education. JA-308-09 (Testimony of Ellen Goldring); JA-354-58 (Testimony of Michael Obel-Omia); JA-359 (Testimony of James Guthrie); *see, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003). The need to reach out is particularly acute in the recruitment of students from families of middle and lower socio-economic status ("SES"). Professor Goldring explained that such families are not in social networks where they can learn through personal contacts about educational choice, and they are not nearly as likely to seek out information about the availability of private alternatives. JA-305-06. As one mother succinctly stated, "If you're not in the market for a used car, you're not going to look at the classified ads." JA-306 (Testimony of Ellen Goldring). Without a recruitment process, talented children in those families are not nearly as likely to be informed about scholarship opportunities.

According to Michael Obel-Omia, teacher and admissions director at Roxbury-Latin in Boston, the best way to reach lower SES families is "[t]hrough personal contact. It's my going out and visiting these families, visiting their schools, seeing them, talk[ing] to them, explaining who we are, sharing Roxbury-Latins's story. That is the most effective way. As I noted on the cards that we have at open house, most kids that come, the majority of them come, check off that they met me." JA-356-57. In the absence of such efforts, meaningful school choice for children in middle- and low-SES ranges is not an option. As a consequence, if private schools like Brentwood cannot use proactive and personalized methods to attract such students, they are severely handicapped in attaining a diverse student body.[9]

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[9] Professor Guthrie explained that private schools have to work harder than public schools to achieve diversity, they have to engage in

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TSSAA's recruitment rule stifles considerable speech that families with school age children would otherwise receive and ought to receive. While no one would contest the need for rules to prevent what is, in fact, coercion or harassment in recruiting, the interpretation that the TSSAA has given to its rule means that many students, and student athletes in particular, will be deprived of educational opportunities because they do not know about them.

The facts in this case illustrate how the recruiting rule can interfere with families' rights to receive news about a school. TSSAA allowed incoming students to participate in spring football practice. If Coach Flatt (or someone at his direction) had not contacted the twelve families, their sons would not have known about the opportunity to join in the practices and, obviously, could not have taken advantage of the opportunity. Parents and students – whether the latter are potential students, already committed students, or enrolled students – have a need and a "right . . . to acquire useful knowledge" about available educational opportunities. *Meyer, supra*, 262 U.S. at 399. As shown below, the TSSAA cannot sustain the arbitrary manner in which it has interfered with that right.

"almost door to door salesmanship. This is Fuller Brush salesmanship, this is knocking on doors, going into low income neighborhoods, finding out where under-represented students live or play, talking to their parents, trying to get into their churches, trying to get into the social activities in which they engage, and explain to them that there are choices from which their children might benefit. . . . It is recruiting." JA-359.

II. APPLICATION OF TSSAA'S RECRUITMENT RULE TO BRENTWOOD ACADEMY'S EXPRESSION WAS NOT NARROWLY TAILORED TO ADVANCE A SIGNIFICANT GOVERNMENTAL INTEREST.

On remand from this Court's ruling in *Brentwood Academy v. Tennessee Secondary Schools Athletic Assn.*, 531 U.S. 288 (2001), the Sixth Circuit characterized the action taken by the TSSAA against Brentwood as a content neutral application of the recruitment rule. That court therefore concluded that TSSAA need satisfy only an intermediate level of scrutiny to sustain its case. 262 F.3d 543, 553-54 (6th Cir. 2001). Assuming that is the applicable standard,[10] TSSAA fails it.

To survive intermediate scrutiny, the government must demonstrate that its rule or action is narrowly tailored to achieve a significant governmental interest and leaves open adequate alternative channels of expression. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45 (1983). TSSAA invokes three interests to support its case: protecting students from exploitation and harassment, preventing athletics from dominating academics, and maintaining competitive equity. Even if those interests are significant, the application of the recruiting rule to Brentwood's expression in this case failed to promote them.

TSSAA disciplined Brentwood for a letter and a phone call to twelve students. Coach Flatt's letter was an

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[10] Part IV, *infra*, explains that TSSAA disciplined Brentwood because of the content of its expression and that that discipline must consequently be measured by strict scrutiny.

unobtrusive means to inform incoming students about the existence and nature of the impending spring practice, which they would not otherwise have known about. The follow-up telephone call clarified that the practices were strictly voluntary. Passing on truthful, nonmisleading information about a lawful activity, this Court has held, is constitutionally protected speech. *E.g., Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 123 (1999); *44 Liquormart, Inc. v. State of Rhode Island*, 517 U.S. 484 (1996); *see also, e.g., Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (truthful disclosures of lawfully acquired information may not be punished absent a necessity to promote an overriding state interest); *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) (same). Thus, unless the manner or means of the expression in this case imperiled the State's interests, the communications could not be subjected to adverse governmental treatment.

Making that point virtually decides this case. A brief letter and a clarifying phone call cannot by any stretch be considered exploitive or harassing.[11] Several parents of students who received the letter testified in this case that they found nothing inappropriate, threatening, harassing, coercive, or harmful in the letter, but they did state that they appreciated being informed about the practices.[12] *E.g.*,

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[11] That obvious fact contributes to the inference that it was really the contents of the letter that provoked the TSSAA. If so, then intermediate scrutiny is not the appropriate analysis. Strict scrutiny is. *See* Part IV, *infra*.

[12] *See also* the testimony of Peabody/Vanderbilt Professor David Guthrie:

> I don't see anything within the context of this letter which is exploitative of students. . . . [T]he obverse of this letter is what's undesirable: The absence of communication. . . . [O]nce a student and his or her family make a commitment

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JA-324-25 (Testimony of John Slaughter); JA-350-51 (Testimony of Milbrey Ganick); JA-352 (Testimony of Harry Allan); 304 F. Supp. 2d at 990-91. Because the TSSAA allowed incoming eighth graders to participate in spring football drills, it can hardly claim that telling those students about the drills put athletics above academics. Nor is it rational to conclude that the letter and phone call implicated the interest in maintaining competitive equity.[13] These were students who had already decided to attend Brentwood, they had a right to participate in the spring practices, and they had previously expressed the desire to play football at Brentwood. Moreover, public high schools under TSSAA's feeder schools exception were entirely free to contact their incoming eighth graders to inform them about spring practice. How could "competitive equity" be promoted by prohibiting one set of schools from providing individual notice about practices while not allowing another set to do so?

TSSAA argues that it is "entitled" to enforce its athletic rules without scrutiny of a rule's particular applications. It is a novel argument. This Court has held, as petitioner notes in its brief at 37, that a rule can be applied to particular facts even though the harms at which the rule is aimed did not, in fact, ensue. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). In *Ohralik*,

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to a school, then I think the appropriate policy ought to be to maximize communication. Tr. Tr. at 853.

[13] Because the TSSAA in no way promoted fair competition by disciplining Brentwood for Coach Flatt's letter and phone calls, it is unnecessary for the Court to determine whether competitive equity is a significant governmental interest. If the Court does address the issue, it should affirm the Sixth Circuit's conclusion that the interest in this case was not substantial for the reasons stated by that Court. *Brentwood Academy v. TSSAA*, 442 F.3d 410, 426-27 (6th Cir. 2006).

however, the rule banning in-person solicitation by lawyers was applied to speech and to circumstances that clearly threatened the state's interests in preventing fraud and coercion. Ohralik was the classic ambulance chaser who had personally approached two 18-year old accident victims to convince them to hire him. One of them he visited on two occasions and while she was still in the hospital. By contrast, a companion case to *Ohralik* invalidated the application of a similar no-solicitation rule because it penalized speech that communicated useful information and did not threaten the state's interest. *In re Primus*, 436 U.S. 412 (1978). The solicitation there was made by letter and was not motivated by profit. Together, these cases say that the state may punish speech that presents a risk of the harm the state can legitimately prevent, but it may not punish speech that is devoid of such risk.

Similarly, the Court in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), encountered a university system rule that banned all solicitation in college dormitories. After finding that the circuit court had used the wrong standard, the Court remanded the case with instructions to determine, first, whether the rule was unconstitutional *as applied* to the speech in question – gatherings akin to Tupperware Parties – and, second, if it was constitutional, whether the rule as interpreted by the Board was facially unconstitutional. *Id.* at 484-86. The only difference between *Fox* and this case is that *Fox* involved commercial speech and this case involves noncommercial informational speech.

While it is true, as Petitioner states, that intermediate scrutiny does not command *least* restrictive alternatives, such analysis does take into account the degree to which the state regulation burdens more speech than is necessary. *E.g., Watchtower Bible and Tract Society of New York,*

Inc. v. Village of Stratton, 536 U.S. 150, 168-69 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 58-59 (1994); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980). That is the essence of "narrow tailoring." In this case, by casting its anti-recruitment net so broadly as to ensnare a letter and a clarifying phone call to already-committed families about a lawful school activity, the TSSAA has burdened far more speech than is necessary to prevent exploitation of students, to keep athletics subordinate to academics, and to foster competitive equity.

III. NEITHER THE GOVERNMENT GRANTS NOR THE PUBLIC EMPLOYMENT DECISIONS ARE ANALOGOUS TO THIS CASE.

Both the TSSAA and the United States, in support of the petitioner, contend that this case should be governed by the doctrines developed in the context of executing government grants and contracts or of public employment. While it is understandable that the TSSAA would want to seize on the speech-restrictive aspects of those doctrines, neither context is analogous. The analyses put forward by the petitioner and the solicitor general are seriously flawed. They also fail to take into account the rights of parents like the *amici* to be informed about schools and about their activities.

A. The Standards Applicable to Government Grants and Contracts Do Not Apply.

Because Brentwood Academy at some point signed a contract, agreeing to abide by TSSAA's rules, and because it did so voluntarily, the TSSAA argues that those facts transform this case into one involving the administration of a governmental grant or contract.

Petitioner's brief points to decisions in which this Court has upheld conditions that Congress imposed on the receipt and use of federal funds. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 126 S.Ct. 1297 (2006); *United States v. American Library Association* ("*ALA*"), 539 U.S. 194 (2003); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Grove City College v. Bell*, 465 U.S. 555 (1984). "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that education institutions are not obligated to accept."[14] *Rumsfeld*, 547 U.S. at ___, 126 S.Ct. at 1306, *quoting Grove City*, 465 U.S. at 575. Undoubtedly, TSSAA could impose reasonable conditions on any funds that it distributes to member schools. That is not this case, however.

The distinction between imposing conditions on funding and imposing conditions on participation is both obvious and meaningful. Within broad limits, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. In *Rust*, for example, the government essentially purchased a set of services; it bought family planning counseling, and the counseling it bought was that which did not include abortion as a family planning alternative. The government there was "simply insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 196. Similarly, in *ALA*, the government decided to underwrite public libraries' provision of internet services "to help public libraries fulfill their traditional role of obtaining

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[14] Even under that relaxed standard, the recruiting rule as applied to Brentwood still cannot withstand invalidation. It is neither reasonable nor predictable to conclude that a ban on "undue influence" applies to Brentwood's speech in this case.

material of requisite and appropriate quality for educational and informational purposes." In doing so, Congress could insist that libraries use their federal dollars for that purpose.

In this case, the TSSAA has funded nothing, and Brentwood does not provide any programmatic services on behalf of the TSSAA. The Association has not purchased any services or speech from Brentwood. Rather, the TSSAA has asserted its regulatory authority over Brentwood and punished it for its expression. *See Brentwood* I, 531 U.S. at 291 (TSSAA is a corporation "organized to regulate interscholastic sport among the public and private high schools in Tennessee); *id.* at 299 (TSSAA fulfills schools' "need [for] some mechanism to produce rules and regulate competition"). The $3,000 TSSAA sought from Brentwood for the letters and phone calls was not for the recoupment of misspent public funds, it was a *fine*. Brentwood's speech in this case was not delivering the Association's message, was not implementing its program, was not delivering any service that the TSSAA had purchased or contracted for. Rather, Brentwood was simply communicating accurate information about a lawful school function to private individuals who were in privity with the school. TSSAA in this case was not functioning as a government speaker, purchaser, or underwriter; rather it functioned as an enforcer.

TSSAA stresses that Brentwood voluntarily joined the Association and, when it did, signed a contract to abide by the Association's rules. Given the school's tripartite educational philosophy melding together academics, athletics and the spiritual, given TSSAA's ban on member schools playing nonmembers without its permission, and given the district court's finding that "TSSAA is effectively the only game in town," 304 F. Supp. 2d at 997, whether Brentwood's entry was really "voluntary" is quite debatable. It is

also beside the point. Without question, TSSAA controls access in Tennessee to a very valuable arena – high school athletics. By its insistence that entry into that arena comes at the price of the surrender of constitutional rights, the TSSAA advocates nothing less than the reimposition of the long discredited right-privilege doctrine.[15]

There are numerous contexts in which individuals voluntarily submit themselves to the authority of a state entity, and agree to abide by that entity's rules, without conferring upon it the capability to create and apply those rules in ways that obliterate constitutional rights. Certainly, students who attend a public university freely choose to do so while also entering into a contractual relation with the school and agreeing to abide by its rules. Yet this Court has consistently applied traditional public forum and content distinction analysis to university efforts to restrain students' speech. Ronald Rosenberger voluntarily enrolled at the University of Virginia and voluntarily sought university funds to support his student group's religious publication. Nevertheless, this Court quite rightly held that the University's refusal to fund the publication, when it funded all other nonreligious and nonpolitical student publications, created a content discrimination that could only be sustained by satisfying strict scrutiny. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

Similarly, this Court applied traditional First Amendment analyses to claims raised by the students in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), who

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[15] For examples of cases rejecting that doctrine, *see Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see generally, e.g.*, William Van Alstyne, *The Demise of the Right-Privilege Doctrine in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

voluntarily attended the University of Wisconsin. Their challenge to the university's assessments for the support of student groups failed because that support was provided in a viewpoint neutral manner, but the students' challenge to a referendum procedure to determine funding or defunding of a particular group appeared suspect. "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. . . . Access to a public forum, for instance, does not depend upon majoritarian consent." *Id.* at 235.[16]

Both *Rosenberger* and *Southworth* applied straightforward First Amendment doctrines without so much as a hint that the voluntary or contractual nature of the students' attendance at the university would call for any diminished protection for their expression. The same can also be said for the Court's prior decisions addressing the First Amendment rights of university students. *E.g., Fox, supra*; *Widmar v. Vincent*, 454 U.S. 263 (1981) (student religious group had equal access right to university facilities); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (expulsion of student for distributing on a college campus a newspaper that included profanity and an offensive cartoon violated First Amendment); *Healy v. James*, 408 U.S. 169 (1972) (student group could not be denied campus recognition because of its political views).[17]

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[16] The issue was remanded for factual clarification. 507 U.S. at 235-36.

[17] The cases recognize that universities may "enforce reasonable rules of conduct," but they cannot enforce the rules in ways that infringe on protected speech. *E.g., Papish*, 410 U.S. at 669-70; *Healy*, 408 U.S. at 180.

The professional licensing decisions offer further support for application of traditional First Amendment principles in this case. Attorneys do not have to join a state bar; there are numerous ways in which they can put their degrees to use without securing a law license. (*E.g.*, law professor, financial advisor, corporate counsel, government attorney.) If they choose to practice law, however, then (in most states) they must join a bar organization and submit themselves to the authority of the state bar. As numerous precedents of this Court have established, that authority to regulate the licensing of lawyers is not a license to ignore members' First Amendment rights. *E.g.*, *Peel v. Attorney Registration and Disciplinary Committee*, 496 U.S. 91 (1990) (discipline of lawyer for providing information about his certification as a civil trial specialist violated First Amendment); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (ban on lawyers' advertising violated their free speech rights); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (bar may not, consistently with the First Amendment, condition admission on answering questions about protected political associations); *Schware v. Board of Law Examiners*, 353 U.S. 332 (1957) (bar could not rely on applicant's past Communist Party membership to conclude he lacked moral character for admission to the bar).

Two cases have particular relevance to the facts in this case. In the first, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the Court overturned as violating the First Amendment a state bar's discipline of a lawyer for mailing a solicitation to persons known to be in need of particular legal services. Correspondence, including a targeted mailing, does not present the same risk of deception and coercion as in-person solicitation does. *Compare Primus*, *supra*, *with Ohralik*, *supra*. Moreover, the Court noted, "the State can regulate . . . abuses and minimize mistakes through far less restrictive and more precise

means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses." 486 U.S. at 476. Accordingly, the State must permit truthful, nonmisleading attempts by a lawyer to inform potential clients about his or her services. Similarly, the TSSAA cannot punish the conveyance by Brentwood of information to families under contract. Rather, if it has a legitimate interest in regulating such correspondence,[18] it can do so by requiring the school to submit copies of the letters.

A second case held that even in-person solicitation by a professional can be protected speech – if it does not threaten the state's regulatory interests. When CPA Scott Fane moved to Florida and became licensed by the Florida Board of Accountancy, he learned that the Board prohibited him from contacting business persons and arranging to meet with them to explain his services and expertise. This Court concluded that the ban on such contacts did not directly advance the Board's interests in preventing fraud, protecting clients' privacy, and maintaining the appearance and fact of accountants' independence. *Edenfield v. Fane*, *supra*. Because Fane proposed selling himself to sophisticated business persons – who receive individualized sales pitches on a recurrent basis – the risk of coercion and deception identified in *Ohralik* was not present. And because the meetings would occur in a business contact, the ban did nothing for clients' privacy. Finally, the Board had failed to adduce any persuasive evidence that the ban enhanced CPAs' independence. 507 U.S. at

[18] The potential for abuse in the communications between a school and families under contract is *de minimis*. Why TSSAA should insinuate itself into such correspondence is not self-evident.

761-63. At the same time, the opportunity for meaningful give and take discussion between Fane and potential clients heightened the First Amendment interests of both sides. Consequently, the Court invalidated the no solicitation rule as applied to Fane's circumstances. In the absence of an actual threat to the government's interest, the state could not preclude the communication of accurate information. In this case, TSSAA's interests in preventing its regulatees from harassing potential students, from overemphasizing athletics, and from disrupting competition do not apply to the conveyance of accurate information by a school in one letter and one phone call to families already under contract.

That returns the analysis to the point made in Part I, *supra*. An interpretation of the First Amendment that would permit the TSSAA to prohibit or punish the speech in this case, and to direct the speech of its regulatees as if they were grant recipients, would seriously threaten the flow of information in competitive markets. In many of these licensing cases – *Va. State Bd. of Pharmacy*, lawyer advertising, *Edenfield*, the case at bar – the governmental entity is suppressing competition. In such cases, it is consumers like the *amici* who are injured. The First Amendment protects the markets of ideas and information, not just the rights of speakers. *E.g.*, *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964); *United States v. Associated Press*, 52 F. Supp. 362, 372, 374-75 (S.D. 1943) (3-judge court) (L. Hand, J.), *aff'd*, 326 U.S. 1 (1945). Fane's potential clients were given the opportunity to decide for themselves if they wanted to hear his spiel. The parents in this case similarly had the right to know about the opportunity to send their children to spring football practice.

B. Brentwood Is Nothing Like an Employee or an Independent Contractor Working for TSSAA.

TSSAA maintains that Brentwood's contract with it renders the school akin to a public employee or an independent contractor that performs services for the State. Hence, the Association says, Brentwood's speech is protected from TSSAA reprisal only if it relates to a matter of public concern.[19] The argument fails for much the same reasons as the government grantee arguments fail. TSSAA has no interest in regulating Brentwood's speech analogous to that described last year by this Court in *Garcetti v. Ceballos*, ___ U.S. ___, ___, 126 S.Ct. 1951, 1958 (2006): "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." Employers pay and direct their employees in order to execute the company or agency business. Thus, when an employee speaks in his

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[19] This Court's cases have held that a public employee's speech regarding a matter of public concern is protected from retaliation unless the government can meet compelling state interest analysis. *E.g.*, *Rankin v. McPherson*, 483 U.S. 378 (1987); *Pickering v. Board of Education*, 391 U.S. 563 (1968). That standard does not apply if the speech is not about a public concern. It does not follow, however, that an employee has no First Amendment right to engage in speech that is unrelated to a matter of public concern. The government certainly could not punish one of its employees for speech about a private matter engaged in away from the workplace and unrelated to any legitimate employer concern. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 547, 553-54 (2001) (Rehnquist, C.J., dissenting) (statute promoted 1st Amendment values by preventing self-censorship of and chilling effect on private speech); *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("We do not suggest . . . that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment"). As demonstrated in Part II, TSSAA had no legitimate interest in disciplining Brentwood's speech in this case.

role as an employee, he or she does so under the employer's supervision. As in *Garcetti,* employee speech in that context is therefore subject to managerial discipline. None of that is relevant to Brentwood, which is not responsible for executing the Association's business. Brentwood performs no service for TSSAA, and TSSAA pays Brentwood nothing. TSSAA's interest in regulating the speech of Brentwood Academy with potential students is completely different from its interest in controlling the speech of the employees who conduct the Association's business.

TSSAA's assertion that Brentwood's contract with it is an "up front" promise to abide by its rules and thus constitutes a waiver also lacks force. Waivers must be knowing and unambiguous. There is no knowing waiver of the right to unobtrusively communicate accurate information in a promise not to engage in "undue influence." To argue that a ban on "undue influence" unambiguously prohibits notifying incoming students about a school activity is to plead for the fantastical.[20] Moreover, even if Brentwood waived some of its own speech rights, it could not waive the rights of *amici* and other parents and of students who had the right to receive information about school activities.

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[20] Petitioner can draw no support from *Snepp v. United States*, 444 U.S. 507 (1980). There, the contract that Snepp signed was unambiguous: everything he wrote had to be submitted to his public employer for approval. Moreover, the concerns of his employer – the C.I.A. – are so different from virtually any other employer, and affect interests of national security and of the highest magnitude, *see* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1503 (1989), that the case cannot possibly be useful guidance in the regulation of speech about high school athletics.

IV. THE RECRUITMENT RULE WAS APPLIED TO BRENTWOOD'S SPEECH BECAUSE OF ITS CONTENT, AND TSSAA CANNOT THEREFORE PUNISH THE SPEECH UNLESS IT CAN SHOW THE SPEECH WAS UNPROTECTED SPEECH OR THAT ITS PUNISHMENT WAS NECESSARY TO ACHIEVING A COMPELLING STATE INTEREST.

Regardless of whether the recruiting rule facially regulates on the basis of content, *see* Part V, it is clear that the rule was applied to Brentwood's speech because of its contents. As the district court noted in this case, "Defendant Ronnie Carter, the Executive Director of the TSSAA, testified that the Spring Practice Letter and follow-up calls were harmful undue influence because of their contents[.]" 304 F. Supp. 2d at 991. The content identified as triggering the recruitment rule included the letter's use of "enrolled" to describe the incoming Brentwood students; Flatt's reference to Brentwood as the students' "new team;" Flatt's qualification that said, "if you are not currently involved in sports" (relevant, TSSAA said, because it emphasized athletics by not mentioning other activities); the phrase, "inconvenience to your parents" (relevant, TSSAA said, because it did not include inconvenience to the students); the phrase "definitely be to your advantage" (relevant, TSSAA said, because that really means the practices were not optional); the coach's phone number; and the phrase "become an Eagle" (relevant, TSSAA said, because the students were not yet attending classes at Brentwood). *Id.* The district court concluded:

> The Court finds that the preponderance of the credible evidence at trial is that the substantive "content" of the Spring Practice Letter and calls mattered and was a significant factor in the

> TSSAA's decision that the letter and calls constituted "undue influence" and violated the Recruitment Rule. The TSSAA penalized Brentwood Academy for the substantive "content" of the Spring Practice Letter and calls and the message they conveyed in this case.

Id., n.4.

Even if the recruitment rule does not specifically refer to speech, if it is applied to speech because of its content, then the First Amendment requires that the speech either be within an excludable category of speech (like defamation, obscenity, etc.) or that the application is necessary to accomplish a compelling state interest. *E.g.*, *United States v. Eichman*, 496 U.S. 310, 315-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 410-16 (1989). Thus, a law that criminalizes disturbing the peace would not on its face raise First Amendment concerns, but its application to the speech expressed in *Cohen v. California*, 403 U.S. 15 (1971), resulted in a finding of unconstitutionality. *Accord*, *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). The same principle has been applied to common law standards regulating conduct but applied to expressive activities because of their content. *E.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress tort applied to magazine parody); *Gelalla v. Onassis*, 487 F.2d 986 (2nd Cir. 1973) (intrusion privacy tort applied to conduct of photojournalist); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Clearly, Brentwood's expression in this instance was not within one of the categories of speech that may be prohibited by the State. Thus, for TSSAA to sustain its disciplining of Brentwood's speech, it must make the showing that its action was necessary to achieve a compelling state interest. *Eichman*, *supra*; *Texas v. Johnson*, *supra*. For the reasons stated in Part II, the TSSAA's application of its

recruiting rule to Brentwood's speech cannot satisfy that demanding standard.

V. TSSAA'S RECRUITING RULE, AS INTERPRETED BY THE TSSAA, IS UNCONSTITUTIONAL ON ITS FACE.

Amici urge this Court to declare the petitioner's recruiting rule to be facially invalid. The brief of *amicus curiae* Association of Christian Schools International has amply explained the rule's facial invalidity, and that explanation need not be repeated here. Part I, *supra*, also describes ways in which the rule spreads a net that encompasses much speech of value to families making school choices. *Amici* briefly supplement those arguments here.

The restrictions on initiating contact, especially when combined with restrictions on personal interaction, are particularly problematic because they prevent schools from reaching low-SES families in an effective manner. As previously explained, those families are not likely to take the initiative in searching out educational alternatives. They will not then obtain the information they need about their choices unless schools are permitted to seek them out. And schools cannot do that effectively without personal contact. As a consequence, the low-SES students miss opportunities otherwise available, and schools like Brentwood lose the diversity they could otherwise obtain.

TSSAA's restrictions on initiating contact cut against some very basic First Amendment values. Those values were recognized and vindicated in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), which overturned an injunction provision that prohibited abortion protestors from approaching within 300 feet of a health clinic any person seeking services of the clinic "unless such person

indicates a desire to communicate." According to the Court:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, see Milk Wagon Drivers, [this] provision cannot stand. . . . The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id. at 774.

Recruitment of high school students can certainly be regulated. The TSSAA can use a wide variety of devices to vindicate its concededly legitimate interests. It can limit the number of contacts a school makes and impose substantial time, place, and manner restrictions on coaches. The net the TSSAA has cast through its interpretation of what is undue influence, however, disables schools from effectively recruiting a wide and diverse range of students. Appropriate school officials need the freedom to identify prospective students who qualify for admission, to initiate contact with parents, and to conduct in-person discussions to address the many issues involved in school choice. For *amici*, TSSAA's use of its recruitment rule is especially problematic because it prevents many parents from obtaining the information they need, and to which they are entitled, to make important decisions about their children's education.

CONCLUSION

This Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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